No. 83-305

IN THE

Supreme Court of the United States

October Term, 1983

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

v.

ALBERT WALTER TROMBETTA, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT

BRIEF OF THE STATE OF MINNESOTA AND THE STATES OF FLORIDA, INDIANA, MISSISSIPPI AND MONTANA AS AMICI CURIAE IN SUPPORT OF PETITIONER THE PEOPLE OF THE STATE OF CALIFORNIA

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INTEREST OF AMICI CURIAE

This case involves breath tests in drunk driving cases. The specific question raised is whether a police officer, after having a driver submit to a breath test, must give the driver a sample of his breath for an independent analysis. The interests of amicus Minnesota and the other amici are similar.

In Minnesota there are more than 40,000 drunk driving arrests each year. Approximately two-thirds of those arrested

take a breath, blood or urine test. Most of these are breath tests.

The Minnesota bureau of criminal apprehension forensic science laboratory has made a thorough investigation of methods for collecting and preserving breath samples for subsequent testing. The laboratory has found that, while it is possible to collect and preserve a breath sample (or certain components thereof), available methods of preservation are unreliable and later analysis of such a sample produces inaccurate results.

SUMMARY OF ARGUMENT

This brief is submitted in support of the position of petitioner State of California.

The Intoxilyzer breath testing instrument used by California police analyzes a breath sample and then expels it. The instrument cannot preserve the sample that has been analyzed.

The California Court of Appeals held in these cases that a police officer must either preserve the sample analyzed by the instrument or collect another breath sample from the accused and preserve that. Since the Intoxilyzer cannot preserve a sample, the court's ruling in effect required the collection of a new sample. Because this was not done in these cases, the court held the test results inadmissible. The court based its decision on the rule of *Brady v. Maryland*, 373 U.S. 83 (1963), which requires a new trial when the defense has requested favorable, material evidence and the prosecution has failed to disclose it. That rule, however, applies only when the evidence is known to the prosecution and not to the defense. *United States v. Agurs*, 427 U.S. 97 (1976). That is not the situation here because in these cases the prosecution possessed no evidence unknown to the defense.

Moreover, *Brady* has nothing to do with either the procedures to be followed in analytical testing or the collection of additional evidence. It provides no basis for the procedural requirement that a breath sample be collected for the use of the accused whenever a breath test is administered to detect drunk driving.

The breath test procedures in these cases met due process requirements for admissibility. As for the California court's concern that the accused have a sample of his own to test, California statutes already allow the accused to make arrangements for his own tests.

For these reasons the California Court of Appeals erred in excluding breath test results, and its decision should be reversed.

ARGUMENT

I. INTRODUCTION.

Respondents were arrested for drunk driving. Following their arrests they provided two breath samples, each of which was analyzed by an Intoxilyzer instrument. After each analysis the breath sample was expelled from the instrument and the instrument was purged with clean air. The Intoxilyzer has no mechanism for retaining and storing a sample after it has been analyzed. The test results for every respondent showed an alcohol concentration over the legal limit of .10.

The California Court of Appeals held that due process required the police to preserve either the breath sample analyzed by the instrument or its equivalent (i.e., an additional sample) for the use of the defendant. The court based its decision on *People v. Hitch*, 12 Cal. 3d 641, 527 P.2d 361, 117 Cal. Rptr. 9 (1974),[1] which in turn relied on this Court's decision in *Brady v. Maryland*, 373 U.S. 83 (1963). *Brady* held that a defendant's due process right to a fair trial was violated when the prosecution suppressed material evidence that was favorable to the accused and that had been requested by the de-

[1] *People v. Hitch* held that the test and reference ampoules of a breathalyzer must be preserved for a defendant's future examination. While some states have followed *Hitch*, *see Lauderdale v. State*, 548 P.2d 376 (Alaska 1976); *Scales v. City Court of City of Mesa*, 122 Ariz. 231, 594 P.2d 97 (1979); *State v. Booth*, 98 Wis. 2d 20, 295 N.W.2d 194 (1980), other jurisdictions have not. *See*, *State v. Phillipe*, 402 So. 2d 33 (Fla. App. 1981); *People v. Godbout*, 42 Ill. App. 3d 1001, 1 Ill. Dec. 583, 356 N.E.2d 865 (1976); *State v. Gross*, 335 N.W.2d 509 (Minn. 1983); *State v. Cornelius*, 452 A.2d 464 (N.H. 1982). Amicus has found just one reported case where an attempt was made to analyze a preserved test ampoule. There, the expert witness was unable to perform an accurate analysis. *People v. Santiago*, 116 Misc. 2d 340, 455 N.Y.S.2d 511 (Sup.Ct. 1982). See also, *State v. Teare*, 135 N.J. Super. 19, 342 A.2d 556 (1975).

fense. Because *Brady* does not apply to the breath samples in these cases, the court erred.

II. THE CALIFORNIA COURT ERRONEOUSLY APPLIED THE *BRADY* RULE TO BREATH SAMPLES.

The California court incorrectly analyzed the issues when it applied the *Brady* rule to the breath samples in these cases. These are not cases in which the prosecution suppressed evidence that was unknown to the defense. Moreover, the court of appeals in effect required the collection of a new sample, not the preservation of the analyzed sample, whereas *Brady* imposes no requirement to collect additional evidence. The court of appeals, unlike other decisions applying *Brady* to situations where the evidence has been lost, did not decide to either affirm the convictions or dismiss the charges but instead excluded the breath test results. Thus the court actually was considering the admissibility of the tests and not any *Brady* issues.

A. *Brady v. Maryland* Does Not Apply to Breath Samples Blown Into An Intoxilyzer.

1. Factually, These Cases Do Not Constitute *Brady* Situations.

This Court noted in *United States v. Agurs*, 427 U.S. 97 (1976) that there are three quite different situations in which the *Brady* rule arguably applies. The three have one thing in common, however: each situation "involves the discovery, after trial, of information which had been known to the prosecution but unknown to the defense." 427 U.S. at 103. This factor is not present in these cases. In every case, the defense

knew just as much about the expelled breath samples as did the prosecution. There was nothing the prosecution could suppress even had it wished to. Thus, the one element essential to invoking the *Brady* rule was absent.

In addition, an examination of each of the three situations discussed in *Agurs* demonstrates that the *Brady* rule does not apply to these breath tests. In the first situation, the undisclosed evidence shows that the prosecution's case includes perjured testimony about which the prosecution knew, or should have known. *See Agurs*, 427 U.S. at 103. This situation obviously is not present.

The second situation, found in *Brady* itself, is characterized by a pretrial request for specific evidence. *See Agurs*, 427 U.S. at 104. Unlike *Brady*, in which the prosecution possessed the requested evidence, the prosecution in these cases did not have any breath samples to disclose when the requests were made. It was not a matter of hiding anything. Even if a request had been made at the time of the breath test, the prosecution could not have given a sample to the respondents because the instrument does not have the capacity to preserve one. The prosecution had no greater ability to capture a sample as it was expelled from the instrument than did the respondents.

In the third situation no request at all is made, or only a general request for "all *Brady* material." In this situation, the prosecution is under no obligation to disclose evidence unless it is obviously of such substantial value to the defense that fundamental fairness requires disclosure even without a specific request. *See Agurs*, 427 U.S. at 106-13. Because the breath samples in these cases contained alcohol concentrations in excess of the legal limit, they were not favorable evidence of substantial value to the defense. Therefore, the third *Brady* situation is not present.

2. There is No Evidence That Additional Analyses of the Samples Would Have Been Favorable to Respondents.

For *Brady* to apply, the allegedly suppressed evidence must have been both material and favorable to the accused. 373 U.S. at 87; *see also Giglio v. United States*, 405 U.S. 150 (1972). In *People v. Hitch*, there was some indication, although of questionable merit,[2] that the lost evidence might have favored the accused. By relying on *Hitch* in the instant cases, the California Court of Appeals has apparently created a presumption that the breath evidence would have been favorable to the accused.

In these cases, however, no such presumption is warranted. In fact, all the evidence supports the conclusion that the "lost" samples would not have been favorable to the respondents. Two samples from each respondent were separately analyzed and the results of the analyses were consistent. This makes it very unlikely that a third or fourth analysis would render favorable results for any of the respondents.

3. The *Brady* Rule Does Not Require Preservation Of A Breath Sample That Is Expelled From An Intoxilyzer As An Integral Part Of The Testing Procedure.

In spite of the foregoing, respondents may argue that, once a breath sample has gone into an Intoxilyzer instrument, the prosecution possesses evidence that must be preserved and given to the accused upon his request.

Brady did not deal with or impose any requirements for the preservation of evidence. There may, of course, be situations in which the loss of evidence constitutes suppression

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[2] See n. 1, *supra* at 4.

under the *Brady* rule. Examples would be the destruction of evidence after it is requested or the destruction of evidence that "is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce." *Agurs*, 427 U.S. at 107. These are not such cases, however.

Petitioner has aptly argued that there can be no preservation requirement if there has been no practical, physical possession of the evidence. Moreover this Court has never held that *all* evidence must be preserved once the government obtains it. In fact, this Court has observed:

> As to petitioner's contention that the claimed destruction of the agents' notes admits the destruction of evidence, deprives him of legal rights and requires reversal of the judgment, it seems appropriate to observe that almost everything is evidence of something, but that does not mean that nothing can ever safely be destroyed. If the agents' notes of Ondrejka's oral reports of expenses were made only for the purpose of transferring the data thereon to the receipts to be signed by Ondrejka, and if, after having served that purpose, they were destroyed by the agents in good faith and in accord with their normal practice, it would be clear that their destruction did not constitute an impermissible destruction of evidence nor deprive petitioner of any right.

Killian v. United States, 368 U.S. 231, 242 (1961). *Killian* was decided before *Brady*. Since *Brady*, this Court has held, in a Jencks Act case in which an earnest effort was made to locate a lost witness statement (a tape recording), that the loss of the statement did not mean that the prosecution had suppressed it. *United States v. Augenblick*, 393 U.S. 348, 355-56 (1969).

The California Court of Appeals, in requiring breath samples to be preserved, relied not on these authorities but instead on the California decision in *People v. Hitch*. *Hitch* in turn based its holding on *United States v. Bryant*, 439 F.2d 642 (D.C. Cir. 1971). *Hitch* quoted with approval the following language in *Bryant*:

> It is most consistent with the purposes of those safeguards [Brady and the federal discovery rules] to hold that the duty of disclosure attaches in some form once the Government has first gathered and taken possession of the evidence in question. Otherwise, disclosure might be avoided by destroying vital evidence before prosecution begins or before defendants hear of its existence. Hence we hold that before a request for discovery has been made, the duty of disclosure is operative as a duty of preservation.

Id. at 651. Although the California Court of Appeals in these cases did not expressly articulate this point, it apparently believed that the foregoing language from *Bryant* required the preservation of the breath samples.

In reaching such a conclusion, however, the California Court of Appeals misconstrued *Bryant*. *Bryant* dealt with a tape recorded conversation, not an ephemeral breath sample. *Bryant* relied at least in part on the fact that the scope of the discovery provisions found in Fed. R. Crim. P. 16(a) and 16(b)[3] included tape recordings. There is no corresponding provision for the discovery of samples (as opposed to the discovery of the results of tests) since Fed. R. Crim. P. 16(a)(1)(D) provides for the discovery of the "results or reports"

[3] The successor rules are Fed. R. Crim. P. 16(a)(1)(A) and (C).

of scientific tests and says nothing about the discovery of samples at all, let alone samples expelled during the testing process.[4]

In fact, one of the cases following *Bryant, United States v. Butler*, 499 F.2d 1006 (D.C. Cir. 1974), reached the same result as the foregoing analysis of Rule 16(a)(1)(D) and in effect held that *Bryant* required preservation of test results but did not require preservation of samples. In *Butler*, the defendant claimed the government had taken a urine sample from him and analyzed it for its alcohol concentration. The court remanded with instructions to consider sanctions if a sample had been taken and analyzed but to leave the conviction undisturbed if a sample had been taken, but not analyzed.

Thus, the D.C. Circuit, whose decision in *Bryant* was the apparent underlying authority for the decision of the California Court of Appeals in these cases, has in effect decided that it is the preservation of the test results, and not the sample itself, that is required. If this applies to a urine sample, which is much more readily collected and preserved than a breath sample, *a fortiori* it applies to a breath sample that is expelled during the testing process. *But see Government of Virgin Islands v. Testamark*, 570 F.2d 1162 (3d Cir. 1978).

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[4] Fed. R. Crim. P. 16(a)(1)(D) provides:

> Reports of Examinations and Tests. Upon request of a defendant the government shall permit the defendant to inspect and copy or photocopy any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial.

The same conclusion results when *Bryant* is analyzed from another perspective. As discussed above,[5] this Court in *United States v. Agurs*, said that *Brady* applies to information that is known to the prosecution and unknown to the defense. Unlike the expelled samples in these cases, the tape recording in *Bryant* was information that was known to the prosecution and unknown to the defense. Therefore, unlike the expelled breath samples, the tape recording was a situation to which *Brady* could apply if the other necessary prerequisites were present.

The California Court of Appeals, however, did not mention this distinction. Rather, it seized upon the sole similarity between the recording and the breath samples—namely, that neither the breath samples nor the recording was in existence any longer. *Bryant* never held that all evidence of any kind whatsoever must be preserved by the government. If it had, it would have been inconsistent with *Killian v. United States*, and *United States v. Augenblick*.

Bryant never purported to hold that the loss of any evidence at all requires a dismissal. Instead *Bryant* considered such things as the degree of bad faith, if any, of the prosecution; the importance of the lost evidence; and the evidence of guilt at trial. *Bryant*, in fact, is replete with suggestions that the agent's bad faith was responsible for the "loss" of the recording. 439 F.2d at 647, 650. There is no such suggestion of bad faith in these cases where the breath samples were expelled as an integral and unavoidable part of the testing procedure. Therefore, the implicit reliance on *Bryant* by the California Court of Appeals is misplaced and there is no *Brady* requirement to preserve a breath sample that is expelled during a test.

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[5] *Supra* at pp. 5-6.

B. The Court Was Not Really Requiring The Production Of The Breath Sample That Was Analyzed But Was Instead Requiring The Collection Of An Additional Sample For The Accused.

The California Court of Appeals required the preservation and subsequent production of either the sample that was analyzed or its equivalent. The court, however, recognized that the Intoxilyzer instrument is not designed to preserve samples after they have been analyzed when it stated:

> [t]he question then is whether the specimen may be exhausted in testing without taking available steps to obtain and preserve another specimen for retesting.

Record, Petition for Certiorari, at A-14. The court, therefore, in effect required the police to take an additional breath sample from a drunk driver and store it in some manner that would allow him to analyze it if he so desired. (The court also quoted with approval a Colorado decision, *Garcia v. District Court*, 589 P.2d 924 (Colo. 1979), that required the police to give a drunk driver a separate sample of his breath at the time of the test.)

The *Brady* rule, of course, does not require and indeed is not concerned with the collection of additional evidence. The imposition of a requirement to collect additional evidence therefore has no basis of support in *Brady* and indicates that the actual rationale for the requirement is something other than *Brady*.

C. The Court's Decision Dealt Only With The Admissibility Of The Breath Tests Results, Whereas The *Brady* Rule Does Not Consider The Admissibility Of Individual Pieces Of Evidence And Instead Considers The Fairness Of The Trial As A Whole.

A drunk driving case does not depend on breath tests alone. Drunk drivers can also be convicted on the strength of the arresting officers' observations about their driving, appearance, demeanor and behavior. When a test result is .05 or lower, however, there is a presumption that the driver is not under the influence. 4 Cal. Veh. Code § 23.155, subd. (1). Obviously if an expelled breath sample had this alcohol concentration, an accused drunk driver would want to have it analyzed for his trial, even if the state's test results were excluded.

The *sine qua non* of *Brady v. Maryland* is that the suppression of evidence results in an unfair trial because the suppressed evidence is favorable to the accused and might therefore have affected the verdict. *See United States v. Agurs*, 427 U.S. 97, 104 (1976). A new trial with the suppressed evidence is the remedy.

Had the California court actually applied the *Brady* rule, it would necessarily have had to conclude that the "suppressed" breath sample was favorable to the accused. Such a conclusion would most likely be that the sample had a concentration of .05 or less. Under such circumstances the absence of the samples would have a very adverse impact on the respondents' cases, regardless of whether the other analyses were in evidence.

Since in these cases the samples have been exhausted and can no longer be analyzed, new trials would still lack the

samples. Thus, the only choices are outright dismissals or affirmances of the convictions. *United States v. Bryant*, 439 F.2d at 642. It was therefore for the Court to determine, pursuant to *Brady*, *Augenblick*, or even *Bryant*, whether the lack of the samples caused such an unfair trial that outright dismissal was in order. That the Court did not make such a decision, and instead excluded the breath test results, demonstrates that the Court was really concerned with the admissibility of the test results and not with the *Brady* rule.

Based upon the foregoing it is clear that the court was actually dealing with the breath test's admissibility. Thus, the issue to be decided is whether due process required that the test results be excluded because the police had not collected a sample for the accused.

III. DUE PROCESS DOES NOT REQUIRE THAT, AS A PREREQUISITE TO THE ADMISSIBILITY OF A BREATH TEST, THE POLICE GIVE AN ADDITIONAL SAMPLE TO THE DRUNK DRIVER FOR HIS OWN ANALYSIS.

The California Court of Appeals essentially decided that, for a breath test to be admissible, the police must furnish a drunk driver with a breath sample that he can have analyzed. Apparently, the California Court of Appeals wished to provide a drunk driving defendant with yet another way of evaluating and possibly attacking the accuracy of the breath test. California is, of course, free to impose by rule or statute whatever admissibility requirements for breath test results that it desires. It cannot, however, impose those requirements under the aegis of the Fourteenth Amendment unless due process requires them.

Even if there might be due process concerns about the admissibility of a scientific test in some cases, there are none in these cases because of the abundant checks on the accuracy of the test.

First, the instrument has been approved by the state department of health for breath tests. Record, Petition for Certiorari at A-6. Second, the health department has adopted regulations setting forth procedures to be used in breath testing. *Id.* at A-6. Third, the instruments were calibrated weekly. *Id.* at A-7.[6] Fourth, the breath tests themselves comprised the analyses of two samples, the results of which were consistent. *Id.* at A-7. (When two separate samples give consistent results it is almost inconceivable that a third, reliable sample would give any different result.) Fifth, after each sample the instrument's chamber was purged with clean air and checked for a reading of zero alcohol. *Id.* at A-7.

Finally, if any of the respondents wished to have an additional test he had the statutory right to arrange a test for his own benefit. Thus, the breath sample evidence which respondents claim the police should have collected and given to them is peculiarly within respondents' control and susceptible to whatever evidence gathering procedures they might wish to employ. Certainly it is not a denial of due process if the police do not collect a sample for an accused who is perfectly free to arrange a test on his own behalf.

The absence of one potential basis for attacking the breath test's accuracy does not make a drunk driving trial unfair; and fairness is the ultimate criterion of due process. *See Brady*, 373 U.S. at 83. This is particularly true in these

[6] The calibration records, together with some of the calibration solutions of known concentrations were available to respondents. Record, Petition for Certiorari at A-7.

cases, where the possibility is very remote that a third sample would yield evidence favorable to a defendant. A sporting theory of justice might assume that, if an accused received a third sample from the police, the presence of that sample and its possible analysis might somehow affect the jury's verdict. This Court, however, has rejected the sporting theory of justice and has refused to raise that trial strategy to the dignity of a constitutional right. *See United States v. Agurs*, 427 U.S. 97, 108 (1976); *Brady v. Maryland*, 373 U.S. 83, 90-91 (1963). Thus, even if there were a possibility that a police-supplied third sample might have affected the juries' verdicts in these cases, the lack of such a sample did not deprive respondents of fair trials.

In conclusion, the accuracy of breath tests does not rise to a constitutional level. Anything else is a matter that should be dealt with by statutes and rules of evidence. *See Miller v. California*, 413 U.S. 15 (1973); *United States v. Augenblick*, 393 U.S. 348 (1969).

CONCLUSION

The California Court of Appeals erroneously applied the rule of *Brady v. Maryland* to these cases. Its decision should be reversed.

Respectfully submitted,

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